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Submitted via US Mail and Electronic Mail
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Re: Proposed Modification of NPDES Permit #CO-R042003 for Stormwater Discharges from Buckley Air Force Base

To Whom it May Concern:

These comments are provided on the proposed modification of NPDES Permit #CO-R042003 for stormwater discharges from Buckley Air Force Base (hereafter "the Permit") on behalf of Natural Resources Defense Council, Conservation Law Foundation, and American Rivers. Our organizations submitted an amicus brief to the Environmental Appeals Board supporting the EPA and the original permit in the U.S. Air Force's NPDES Appeal No. 13-07 on April 14, 2014.

We are concerned by certain proposed changes to the Permit, which weaken its requirements and delegate too much discretion to the Permittee. As described further below, some of the proposed modifications run afoul of the Clean Water Act's "maximum extent practicable" standard for MS4 permits and implementing regulations and cannot be included in a permit without violating the law.

The Permit Delegates Too Much Discretion to the Permittee to Determine What Controls Are "Practicable"

While the current permit requires the Permittee to maintain predevelopment hydrology for all new and redevelopment construction projects larger than one acre, EPA now proposes to modify that provision so that the Permittee must only "attempt" to maintain predevelopment conditions, "except to the extent it is impracticable to do so." EPA further proposes to include a list of reasons why the Permittee may determine that attaining predevelopment conditions is impracticable, but this list is non-exclusive; i.e., the Permittee may reach such determination for other reasons not included in the list. This proposed modification impermissibly leaves the Permittee, and not EPA, in charge of determining when full compliance with the performance standard is required.

The Clean Water Act requires that municipal stormwater permits "require controls to reduce the discharge of pollutants to the maximum extent practicable," often referred to as the MEP standard. 33 U.S.C. § 1342(p)(3)(b)(iii). This is a robust and meaningful standard. It "does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 131 (D.D.C. 2001) (internal citations omitted); *see also Friends of Boundary*

Waters Wilderness v. Thomas, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible"). While the term "practicable" is not defined in the municipal stormwater context, "practicable" as used in a different section of the Clean Water Act has been defined as meaning that technology is required unless the costs are "wholly disproportionate" to pollution reduction benefits. *Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990). Accordingly, § 402(p) by its terms requires permit provisions that reduce stormwater discharges as far as technically feasible, unless costs are "wholly disproportionate" to benefits.

When it adopted the MEP standard in the 1987 amendments to the Act, Congress did not intend that permit writers leave it to the permittee's discretion to decide for itself what specific practices to apply in any given situation. While we do not advocate for rigidity in the selection of management practices to control stormwater—as the appropriate mix of approaches for any given situation depends on multiple factors—it is EPA's job to ensure that there is some standard that the Permittee must ultimately achieve, even if the precise mechanisms used to meet it are not necessarily prescribed.

The proposed modifications undermine the Permit's EPA-established standard for development on the base. By providing that the Permittee need only maintain predevelopment conditions "except to the extent it is impracticable to do so," the proposal allows the Air Force to decide for itself whether meeting this core Permit requirement is "practicable" at any given site. Determining whether a permittee is meeting the requirements of the Clean Water Act is the permitting authority's responsibility. The Ninth Circuit has held that EPA must oversee permittees' stormwater programs to ensure that they meet the MEP standard. Otherwise, "nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable." *Environmental Defense Center v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003).

The same principle applies here. Allowing the Permittee to decide that maintaining predevelopment conditions is "impracticable" creates the type of "impermissible self-regulatory system" found unlawful in *Environmental Defense Center*. *Id.* at 854. Indeed, directing permittees to satisfy permit requirements "to the extent it is []practicable to do so" contravenes EPA's own guidance for MS4 permits. As EPA states in its *MS4 Permit Improvement Guide*:

> First, and most importantly, permit provisions should be clear, specific, measurable, and enforceable. Permits should include specific deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation. Doing so will allow permitting authorities to more easily assess compliance, and take enforcement actions as necessary. … *[V]ague phrases such as 'as feasible' and 'as possible' should be avoided because they result in inconsistent implementation by permittees and difficulties in permit authority oversight and enforcement*. The permit writer's role is to determine what is necessary to achieve in a permit term, and to develop clear, enforceable language that conforms to these determinations.[1]

[1] U.S. EPA, Office of Water, *MS4 Permit Improvement Guide* at 5-6 (Apr. 2010), *available at* http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf (emphasis added).

For example, the guidance specifically notes that sample permit language requiring a permittee to take action "to the maximum extent practicable" "could be strengthened."[2] EPA's use of the phrase "except to the extent it is impracticable to do so" in the modifications proposed for this Permit is functionally equivalent to using the phrase "to the maximum extent practicable."

Other EPA Regions have also objected to state-issued MS4 permits on the grounds that they contained language similar to what Region 8 is proposing to include here. For example, EPA Region 3 issued specific objection letters to several Maryland-issued MS4 permits in 2012, stating:

> Throughout EPA's permit mark up, we requested removing the use of the phrase 'maximum extent practicable' or 'MEP'. EPA has a number of concerns about inclusion of this language: it is imprecise in its interpretation and thus makes enforcing the permit terms more difficult; it could lead to backsliding; and it rightfully is a determination to be made by the permitting authority in the permit's terms. All references to MEP with the exception of the requirements that the permittee develop and implement the 'Storm water Management Act of 2007 and Environmental Site Design to the MEP' should be modified.[3]

In addition, Region 2 stated in comments on New York's draft statewide Phase II MS4 permit: "NYSDEC states in the MS4 permit that the permittee implement provisions 'to the maximum extent practicable (MEP).' NYSDEC should determine what is the MEP, not the permittee, and the general permit should, to the extent practicable, specify in objective terms what is expected of an MS4 in order to meet the MEP standard."[4] It is arbitrary, capricious, and not in accordance with law for Region 8 to add "MEP" language to this Permit when other Regions have explicitly admitted that it undermines enforceability and is otherwise unlawful.

Further, including "to the maximum extent practicable" in permits also flouts the advice of the National Research Council's committee on reducing stormwater pollution. The NRC's seminal report *Urban Stormwater Management in the United States* laments the fact that many permits leave MEP to the "discretionary judgment" of the permittee.[5] According to the NRC, "The ambiguity of the term 'maximum extent practicable' (MEP) has been a major impediment to achieving meaningful water quality results in the MS4 program."[6] The NRC therefore recommends that the MEP standard be defined in concrete, objective terms rather than being left up to the permittee to define.[7]

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[2] *Id.* at 6.
[3] U.S. EPA Region III, Specific Objection to Anne Arundel County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068306 at 4 (Aug. 8, 2012); U.S. EPA Region III, Specific Objection to Baltimore County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068314 at 4 (Aug. 8, 2012); U.S. EPA Region III, Specific Objection to Prince George's County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068284 at 4 (Aug. 8, 2012).
[4] U.S. EPA Region II, EPA Region 2 Comments on NYSDEC Draft MS4 Permit at ¶ 2 (2010).
[5] National Research Council, *Urban Stormwater Management in the United States* at 101 (2009), *available at* http://www.nap.edu/catalog.php?record_id=12465.
[6] *Id.* at 542.
[7] *Id.*

In light of the National Research Council's findings and EPA's own guidance, inserting the phrase "to the maximum extent practicable" into the Permit is unwarranted and unlawful. The fact that the proposed modifications contain a list of permissible reasons for an impracticability finding does not redress the problem. While it appears to put an outer bound on the Permittee's discretion, the list's effects are illusory because it is by its terms non-exclusive (stating that the reasons for impracticability "may include…") and because the final item on the list is a vague catch-all ("other operational or design considerations specific to the military function" of the Base) that could be interpreted broadly enough to be rendered meaningless. In the Statement of Basis, EPA explicitly admits that "there may be other types of site constraints that may be present, and therefore [EPA] has provided the flexibility in this provision to allow for the possibility that there are other causes of impracticability that did not occur to the Agency." However, flexibility in this context – effectively providing discretion for the Permittee to decide not to comply with Permit requirements – creates an "impermissible self-regulatory system."

Either EPA must determine in the first instance what level of stormwater management is "practicable," and therefore meets the MEP standard, or it must review and approve any such determinations made by the Permittee. The approach proposed by the modifications, providing for EPA review only after-the-fact in annual reports, frustrates enforcement of the law. If EPA intends to allow the Air Force to make its own initial determinations about impracticability, EPA must pre-approve those determinations, before the development project is constructed and while the Permittee still has the ability to modify its stormwater management plans if they are found to be inadequate.

Even If the Permittee Could Lawfully Make Its Own Determinations of Impracticability, the Permit's Alternative Compliance Mechanism Falls Short of the MEP Standard.

Assuming that EPA could lawfully allow the Permittee to decide for itself the level of stormwater control that meets the "maximum extent practicable" standard – a premise that we reject, as explained above – the proposed alternative compliance mechanism that applies after such decisions are made is itself inadequate to satisfy the MEP standard.

First, the alternative compliance requirement is excessively vague. The proposed modifications require the Permittee, once it has determined it is impracticable to maintain predevelopment runoff conditions at a development site, to "install or utilize, and maintain, stormwater control measures to prevent or minimize water quality impacts from post-construction stormwater discharges from the new or redevelopment site." This new requirement, "prevent or minimize water quality impacts," is undefined and hence extremely unclear. Does the Air Force have to prevent impacts, or minimize them? These two verbs are not synonymous. Further, what does "minimize" mean? How much must impacts be reduced in order to be "minimized"?

The fact that the provision provides no clear answers to these questions means that it is unacceptably vague, potentially hindering EPA and the public's ability to monitor compliance

with, and if necessary enforce, the Permit. In fact, in a challenge to the 2007 Western Washington Phase I general permit, Washington State's Pollution Control Hearings Board set aside as invalid a permit provision that only required permittees to "reduce" pollutants, without providing either a clear metric or oversight from the state. *Puget Soundkeeper Alliance v. State of Washington*, 2008 WL 5510413 (Aug. 7, 2008). The provision EPA has proposed here is equally vague and equally unlawful.

In the Statement of Basis, EPA states that, if site constraints justify a finding of impracticability, "the Permittee is not relieved of the requirement … to attempt to maintain predevelopment runoff conditions. Rather, if the Permittee determines that it is impracticable to manage the onsite entire volume of stormwater associated with predevelopment runoff conditions … the Permittee would still be required to attempt to manage as much of this volume as is practicable." If that is what EPA intends for the "prevent or minimize" standard to mean, this intent is not at all clear from the text of the proposed permit modifications. EPA must revise the proposed modifications so it is clear what standard applies to the Permittee when it determines that full compliance with the predevelopment conditions requirement is impracticable.

However, even if the terms "prevent or minimize" were adequately defined, the alternative compliance approach would still fall short of the MEP standard because it requires less of the Permittee than what other jurisdictions have shown to be practicable. In other places around the country, MS4 permittees who are subject to an on-site retention standard, and who cannot meet that requirement due to reasons of technical infeasibility, have the option of retaining what volume they can on-site and making up the rest of the volume off-site. They are not permitted to achieve less than the full volume through their combined on-site and off-site management measures.[8] In fact, some jurisdictions, like West Virginia, require even *more* total volume to be captured if full compliance cannot be achieved on-site and off-site mitigation is used.[9]

The experiences of these other jurisdictions show that requiring the full stormwater volume to be captured through a combination of on-site and off-site controls is a practicable approach. It ensures that the full volume (with its associated pollutants) is captured *somewhere* in the same watershed. That is a higher standard than requiring a permittee to "minimize" water quality impacts from the new or redevelopment site, which assumes by definition that less than the full predevelopment hydrology volume will be captured, as the alternative compliance requirement only applies in cases when the Permittee decides not to fully maintain predevelopment conditions. Therefore, EPA should revise the proposed modifications to require

[8] *See, e.g.*, U.S. EPA Region III, Permit for the District of Columbia Municipal Separate Storm Sewer System at 4.1.3 (Oct. 2011, modified Nov. 2012), available at http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf ("On-site volume plus off-site volume . . . must equal no less than the relevant volume in Section 4.1.1 [the on-site retention standard].").

[9] West Virginia Dep't of Envtl. Protection, General NPDES Permit No. WV0116025 at II.C.b.5.ii.A.4 (July 2009), *available at* http://www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Documents/WV%20MS4%20permit%20FINAL%20(2)%204-26-12.pdf.

off-site mitigation of the full stormwater volume when maintaining predevelopment conditions on-site is impracticable.

In conclusion , we urge EPA to revise the proposed modifications so that they conform to the applicable requirements of the Clean Water Act. Alternatively, we suggest that EPA decline to modify the Permit altogether, as it already contains robust stormwater management standards that meet legal mandates.

Sincerely,

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